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Sykt Sebati Sdn Bhd v Pengarah Jabatan Hutan Negeri Selangor & Anor

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 21–136 OF 2008
LIM CHONG FONG JC
19 MAY 2014

Contract — Repudiation — Alleged contract — Concession agreement to carry out forestry logging activities — Draft formal agreement sent to be executed between parties — Other party silent and did not respond — Plaintiff allowed to carry out logging activities even without formal contract — Whether there was logging contract between parties based on approval letter and performance notwithstanding that no formal agreement was executed by parties — Whether logging contract lawfully terminated due to repudiation

This was a suit for compensation arising from a concession agreement for carrying out forestry logging activities at the Bukit Gading and Bukit Belata Forest Reserve in Selangor. The plaintiff applied to the first defendant and the Menteri Besar of Selangor for long term sustainable management of forests concession to maintain the plaintiff's continuing involvement in the forestry and logging sectors principally in Selangor. The plaintiff sent a copy of the draft formal agreement as proposed by the plaintiff to be executed between the plaintiff and the second defendant for review and comment by the first defendant. However, there was no response from the first defendant. In the meantime, the plaintiff was permitted as from 2000 to commence and carry out logging activities in the Bukit Gading as well as the Bukit Belata forests. The plaintiff commenced extracting timber from Hutan Simpan Gading. The first defendant finally replied to the plaintiff proposing a standard format of the formal agreement to be executed between the plaintiff and the second defendant. Accordingly, the plaintiff principally adopted the format and followed up by sending the revised draft formal agreement ('draft formal agreement') for review and comment but the first defendant did not respond. While still working on various compartments, the first defendant told the plaintiff to halt the latter's logging activities in the Taman Warisan Negeri ('Taman Warisan') area of the state. By a further letter, the first defendant permitted the plaintiff to continue to log in the affected area for a further six months period pending the notification of the Taman Warisan in the State *Gazette*. The plaintiff was required to apply for alternative areas to the affected areas for continued logging. The plaintiff complied accordingly but the first defendant notified the plaintiff that the alternative areas applied for were unsuitable. The plaintiff did not apply for further alternative areas and the first defendant did not also issue any further logging license or permit to the

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plaintiff for those areas in the Taman Warisan. It was the plaintiff's case that there was a logging contract between the parties based on the approval letter and the performance notwithstanding that no formal agreement was executed by the parties. This logging contract was however terminated by reason that the defendants prevented the plaintiff from further carrying out logging activities in the concession area. The defendants also failed and/or refused to issue new logging licenses and permits to the plaintiff. The plaintiff asserted that the aforesaid prevention and failure and/or refusal on the part of the defendants constituted a repudiatory breach of contract. Accordingly the plaintiff claimed for a compensation. The issues that arose were whether there was a contract between the second defendant and the plaintiff notwithstanding the lack of a signed written agreement; and if there was a contract, whether the logging contract was lawfully terminated due to repudiation by the defendants.

Held, dismissing the claim with costs:

(1) The parties were ad idem on the terms including those as proposed in the draft formal agreement. This document was based on provisions as proposed by the first defendant and re-submitted by the plaintiff to the defendants for adoption and execution. The defendants did not respond whatsoever yet the defendants continued to recognise the logging contract by permitting the plaintiff to work normally (see para 26).

(2) There was no clear stipulation as to who was responsible for drawing up the agreement but it was plain that this condition could only be met with co-operation from both parties. The plaintiff had in fact within the six months period nevertheless undertaken that task by submitting the initial draft formal agreement to the defendants on 16 November 1999. Since there was no response whatsoever from the defendants, the requirement for execution within that period was waived, otherwise the defendants would be estopped from objecting to it since the defendants had themselves prevented the fulfillment of that requirement. The defendants cannot take advantage of their own wrong (see para 27).

(3) The defendants had not sufficiently discharged their burden of proof that the plaintiff failed to submit the requisite plans and reports. There was no contemporaneous written complaint whatsoever by the first defendant which would reasonably be expected if indeed there was such failure. Moreover, the forest ranger responsible for overseeing the operations of the plaintiff's works testified that the plaintiff complied with the required procedures (see para 29).

(4) There was no repudiatory breach of contract on the part of the defendants. Thus and notwithstanding that there was a binding contract between the parties, there was however no repudiation of the contract by the defendant to justify the plaintiff's claim for compensation (see paras 33 & 40).

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[Bahasa Malaysia summary

Ini adalah tindakan untuk pampasan berbangkit daripada perjanjian konsesi kerana menjalankan aktiviti pembalakan perhutanan di Hutan Simpanan Bukit Gading dan Bukit Belata di Selangor. Plaintif memohon kepada defendan pertama dan Menteri Besar Selangor untuk pengurusan jangka panjang mapan konsesi hutan untuk mengekalkan penglibatan plaintif berterusan dalam sektor perhutanan dan pembalakan terutamanya di Selangor. Plaintif menghantar salinan draf perjanjian rasmi seperti yang dicadangkan oleh plaintif untuk dilaksanakan antara plaintif dan defendan kedua untuk semakan dan komen oleh defendan pertama. Walau bagaimanapun, tidak terdapat jawapan daripada defendan pertama. Sementara itu, plaintif diberikan kebenaran semenjak dari tahun 2000 untuk memulakan dan menjalankan aktiviti pembalakan di Bukit Gading dan juga di hutan Bukit Belata. Plaintif memulakan dengan mengeluarkan balak dari Hutan Simpan Gading. Defendan pertama akhirnya menjawab kepada plaintif dengan mencadangkan format standard perjanjian rasmi dilaksanakan antara plaintif dan defendan kedua. Oleh itu, plaintif secara utamanya menggunakan format tersebut dan diikuti dengan menghantar draf perjanjian rasmi yang disemak semula ('draf perjanjian rasmi') untuk semakan dan komen tetapi defendan pertama tidak menjawab. Semasa masih bekerja di pelbagai kompartmen, defendan pertama memberitahu plaintif untuk memberhentikan aktiviti pembalakannya di Taman Warisan Negeri ('Taman Warisan') kawasan kerajaan negeri. Dengan surat selanjutnya, defendan pertama membenarkan plaintif untuk meneruskan pembalakan di kawasan yang terjejas untuk tempoh enam bulan selanjutnya sementara menunggu pemberitahuan mengenai Taman Warisan di dalam *Warta* Kerajaan Negeri. Plaintif dikehendaki memohon untuk kawasan-kawasan alternatif kepada kawasan yang terjejas bagi meneruskan pembalakan. Plaintif mematuhi dengan sewajarnya tetapi defendan pertama memberitahu plaintif bahawa kawasan-kawasan alternatif yang dipohon adalah tidak sesuai. Plaintif tidak memohon untuk kawasan-kawasan alternatif selanjutnya dan defendan pertama juga tidak mengeluarkan apa-apa lesen pembalakan lanjut atau permit kepada plaintif bagi kawasan-kawasan di Taman Warisan tersebut. Adalah kes plaintif bahawa terdapat kontrak pembalakan antara pihak-pihak berdasarkan atas surat kebenaran dan prestasi walaupun tiada perjanjian rasmi dilaksanakan oleh pihak-pihak. Kontrak pembalakan walau bagaimanapun ditamatkan atas alasan bahawa defendan-defendan menghalang plaintif daripada menjalankan aktiviti pembalakan selanjutnya di kawasan konsesi. Defendan-defendan juga gagal dan/atau enggan mengeluarkan lesen pembalakan baru dan permit kepada plaintif. Plaintif berhujah bahawa halangan tersebut dan kegagalan dan/atau keengganan di pihak defendan-defendan membentuk pengingkaran kemungkiran kontrak. Dengan itu plaintif menuntut untuk pampasan. Isu-isu yang berbangkit adalah sama ada terdapat kontrak di antara defendan kedua dan plaintif walaupun tidak terdapat perjanjian bertulis yang ditandatangani;

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dan jika terdapat kontrak, sama ada kontrak pembalakan adalah sah ditamatkan akibat pengingkaran oleh defendan-defendan.

Diputuskan, menolak tuntutan dengan kos:

(1) Pihak-pihak adalah ad idem atas terma-terma termasuk yang dicadangkan dalam draf perjanjian. Dokumen ini adalah didasarkan atas peruntukan-peruntukan seperti yang dicadangkan oleh defendan pertama dan dikemukakan semula oleh plaintif kepada defendan-defendan untuk penggunaan dan pelaksanaan. Defendan-defendan tidak menjawab apa-apa pun tetapi defendan-defendan terus menerima kontrak pembalakan dengan membenarkan plaintif untuk bekerja seperti biasa (lihat perenggan 26).

(2) Tidak terdapat ketetapan kepada siapa yang bertanggungjawab untuk membuat perjanjian tetapi adalah jelas bahawa syarat ini hanya dapat dipenuhi dengan kerjasama daripada kedua-dua pihak. Plaintif sebenarnya walau bagaimanapun dalam tempoh enam bulan telah menjalankan tugas dengan menyerahkan draf permulaan perjanjian rasmi kepada defendan-defendan pada 16 November 1999. Memandangkan tidak terdapat apa-apa jawapan daripada defendan-defendan, keperluan untuk melaksanakan dalam tempoh tersebut diketepikan, jika tidak defendan-defendan akan diestop daripada membantah kepadanya memandangkan defendan-defendan telah menghalang diri mereka daripada memenuhi kehendak tersebut. Defendan-defendan tidak dapat mengambil kesempatan atas kesalahan mereka (lihat perenggan 27).

(3) Defendan-defendan tidak melepaskan beban pembuktian mereka dengan mencukupi bahawa plaintif gagal untuk menyerahkan pelan dan laporan yang diperlukan. Tidak terdapat apa-apa aduan bertulis semasa oleh defendan pertama yang akan secara munasabah dijangka jika sekiranya terdapat kegagalan sedemikian. Lebih lagi, renjer hutan yang bertanggungjawab menyelia operasi kerja-kerja plaintif memberi keterangan bahawa plaintif mematuhi prosedur yang dikehendaki (lihat perenggan 29).

(4) Tidak terdapat kemungkiran kontrak oleh pihak defendan-defendan. Oleh itu walaupun terdapat kontrak mengikat di antara pihak-pihak, walau bagaimanapun tidak terdapat pengingkaran kontrak oleh defendan untuk menjustifikasikan tuntutan penuntut untuk pampasan (lihat perenggan 33 & 40).]

Notes

For a case on alleged contract, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) para 5949.

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Cases referred to

Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754, SC (refd)
Bukit Kiara Resort Bhd v Dato Bandar Kuala Lumpur [2012] 2 MLJ 783, HC (refd)
Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2013] 6 MLJ 836; [2013] 7 CLJ 969, CA (folld)
Industrial & Agricultural Distribution Sdn Bhd v Golden Sands Construction Sdn Bhd [1993] 3 MLJ 433, HC (refd)
LSSC Development Sdn Bhd v Thomas a/l Iruthayam & Anor [2007] 4 MLJ 1, CA (folld)
Nippon Express (M) Sdn Bhd v Che Kiang Realty Sdn Bhd & Anor [2013] 7 CLJ 713, CA (refd)
Pembinaan Perwira Harta Sdn Bhd v Letrikon Jaya Bina Sdn Bhd [2013] 2 MLJ 620; [2013] 2 AMR 210, FC (folld)
Pengurusan Danaharta Nasional Bhd v Dato' Sng Chee Hua & Anor [2006] 6 MLJ 477; [2006] 8 CLJ 345, HC (folld)
Poon Guan Sdn Bhd v Sem Siong Industries Sdn Bhd [1983] 2 MLJ 317, FC (refd)
Sim Chio Huat v Wong Ted Fui [1983] 1 MLJ 151, FC (refd)
Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd [1998] 1 MLJ 697, HC (folld)

Legislation referred to

Contracts Act 1950 s 40
Evidence Act 1950 s 101
National Forestry Act 1984 s 106
Selangor Forestry Rules 1988

Kirubakaran (R Ramanathan, Nadzarin Wok Nordin and Shazryll Aizad with him) (Nadzarin Kuok Puthucheary & Tan) for the plaintiff.
Rafiqha Hanim (Kam bt Sani and Mustaffa bin Khayalom with her) (Legal Officer, Selangor Legal State Offices) for the defendants.

Lim Chong Fong JC:

INTRODUCTION

[1] This is a suit for compensation arising from a concession agreement for carrying out forestry logging activities at the Bukit Gading and Bukit Belata Forest Reserve in Selangor.

[2] The plaintiff is a private limited company previously owned by the second defendant and had been involved in forestry activities in excess of 15 years. The second defendant is the State Government of Selangor and the first

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defendant is the Director of Forestry Department of the State of Selangor responsible for the implementation and monitoring forestry activities in the state.

THE TRIAL PROCESS

[3] The trial lasted three days from 5–8 February 2014. It was agreed by the parties that the trial at this stage is only on two core issues of liability, to wit:

(a) whether there is a contract in existence between the second defendant and the plaintiff notwithstanding the lacked of a signed written agreement required in condition (a) in the first defendant's letter dated 30 September 1999 ('approval letter') and

(b) if there was a contract in existence, whether the logging contract was lawfully terminated due to repudiation by the defendants?

[4] The documentary evidence adduced at this stage of the trial are trial bundles B1, B2, B3, B4, G, H, I, J1, J2 and J3 and the following witnesses were called by the respective parties:

(a) Zainal bin Hj Palil ('PW1') who is the managing director of the plaintiff;

(b) Ramlan bin Salim ('PW2') who was a former ranger of the Selangor Forestry Department;

(c) Dato' Razani bin Ujang ('DW1') who was the Director of the Selangor Forestry Department between 15 July 1995 and 31 March 2004;

(d) Mangsor bin Mohd Yusof ('DW2') who was the deputy forestry officer of the Hulu Selangor District; and

(e) Dato' Nik Mohammad Shah bin Nik Mustafa ('DW3') who was the Director of the Selangor Forestry Department between 1 April 2004 and 1 September 2007.

[5] After the close of the trial, the parties submitted their respective written closing submissions-in-chief and in reply. The parties thereafter made their respective oral clarifications on 17 April 2014.

BACKGROUND FACTS

[6] By letters dated 11 April 1996 and 15 May 1999, the plaintiff made applications to the first defendant and the *Menteri Besar* of the State of Selangor for long term sustainable management of forests concession. The object of the applications was to maintain the plaintiff's continuing involvement in the forestry and logging sectors principally in the State of Selangor.

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[7] By the approval letter dated 30 September 1999, the first defendant wrote to inform the plaintiff that the second defendant had approved the plaintiff's application. This letter merits reproduction in full.

Ruj. Kami: PHN.Sel. 05/10/1/39 (1)

Tarikh: 30 hb. September, 1999.

Pengurus,

Syarikat Sebati Sdn. Bhd.,

Lot 3005, Jalan Ulu Yam Baru,

44300 Batang Kali,

Hulu Selangor.

Tuan,

Permohonan Peruntukan Kawasan Hutan Untuk

Perjanjian Jangka Panjang Oleh Sebati Sdn. Bhd.

Bagi Pengurusan Hutan Secara Berkekalan.

Dengan hormatnya merujuk kepada perkara di atas sukacita dimaklumkan bahwa Majlis Mesyuarat Kerajaan Negeri Selangor yang bersidang pada 18 Ogos, 1999 telah meluluskan permohonan tuan bagi kawasan hutan perjanjian jangka panjang sejumlah lebih kurang 9,000 hektar di Hutan-hutan Simpanan Gading dan Bukit Belata seperti di pelan dan lampiran-lampiran berkembar dengan syarat-syarat berikut:-

(a) Satu Perjanjian hendaklah ditandatangani di antara Kerajaan Negeri dan pihak Syarikat Sebati Sdn. Bhd. dalam masa 6 bulan kelulusan diberikan;

(b) Tempoh perjanjian adalah selama 30 tahun mulai 1999 sehingga 2028.

(c) Catuan Tebangan Tahunan ialah seluas lebih kurang 300 hektar setahun.

(d) Pihak Syarikat hendaklah menyediakan satu Rancangan Pengurusan Hutan untuk setiap sepuluh tahun dan juga bagi tempoh perjanjian bagi kawasan tersebut.

(e) Satu Rancangan Pengusahasilan Hutan perlu disedia dan diluluskan oleh Pengarah Perhutanan Negeri sebelum sesuatu kawasan catuan dibuka.

(f) Syarikat juga hendaklah melaksanakan kerja-kerja pemulihan dan pembangunan hutan di kawasan tersebut dan satu rancangan pembangunan hendaklah disediakan. Satu laporan kemajuan tahunan mengenai aktiviti-aktiviti yang dijalankan hendaklah dikemukakan kepada Pengarah Perhutanan Negeri untuk tujuan pemantauan.

(g) Semua operasi perhutanan syarikat hendaklah sentiasa tertakluk kepada arahan-arahan semasa serta enakmen-enakmen perhutanan yang berkuatkuasa.

(h) Caj-caj yang dikenakan adalah pada kadar yang berkuatkuasa.

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(i) Pengarah Perhutanan Negeri berhak mengenakan apa-apa syarat selaras dengan keperluan Enakmen-enakmen dan Kaedah-kaedah yang berkuasa.

(j) Kerajaan Negeri juga berhak menarik balik semua atau sebahagian kawasan - bila-bila masa apabila diperlukan.

Sekian, dimaklumkan.

'BERKHIDMAT UNTUK NEGARA'

Saya yang menurut perintah,

(RAZANI BIN UJANG)

PENGARAH PERHUTANAN NEGERI,

SELANGOR DARUL EHSAN.

s.k:

Pegawai Hutan Daerah,

Hulu Selangor, 48000

Rawang. RU/ls.

[8] Pursuant to the approval letter, the plaintiff by letter dated 16 November 1999 wrote to the first defendant enclosing a copy of the draft formal agreement as proposed by the plaintiff to be executed between the plaintiff and the second defendant for review and comment by the first defendant. There was no response from the first defendant.

[9] In the meantime, the plaintiff was permitted as from 2000 to commence and carry out logging activities in the Bukit Gading as well as the Bukit Belata forests. The activities involved the first defendant approving and issuing logging licenses pursuant to the National Forestry Act 1984 and the Selangor Forestry Rules 1988 made thereunder upon the application of the plaintiff for each compartment of forest proposed to be worked on by the plaintiff. The plaintiff also paid the required cess and premium for each of the licenses issued. In this regard, the plaintiff commenced extracting timber from the Hutan Simpan Gading Kompt 71 based on license condition US/HS/25/2000/B for the area of 348 hectares and the plaintiff paid premium at RM600 per hectare.

[10] The plaintiff again by letter dated 5 September 2001 wrote to the first defendant enclosing the draft formal agreement for review by the first defendant. Again, there was no response from the first defendant.

[11] After persistent follow ups by the plaintiff, the first defendant finally by a letter dated 10 May 2003 wrote to the plaintiff proposing a standard format of the formal agreement to be executed between the plaintiff and the second

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defendant. Accordingly, the plaintiff principally adopted the format and by letter dated 7 July 2003 wrote to the first defendant enclosing the revised draft formal agreement ('draft formal agreement') for review and comment by the first defendant.

[12] The draft formal agreement contains the following material terms adopted from the format provided by the first defendant:

B. CONSIDERATION

In consideration of the Company fulfilling the terms and conditions of this Agreement, the Government shall in consideration allow the Company thirty (30) years of concession in maintaining, managing (including forest management, plantation development plan and programme), felling, cutting, collecting, removing, converting and selling the trees in the forest reserve at the Gading and Bukit Belata Forest Reserve (hereinafter referred to as 'the said forest reserve').

The company is given the concession on the understanding and undertaking of the Government that at all material times the company is given the concession on a minimum acerage of 300 hectares with a yield of not less than 30 m3 tonne per hectare or such higher sum (hereinafter referred to as 'the concession')

C. CONTRACT PERIOD

This agreement shall be for a period of thirty (30) years commencing from year 1999 (hereinafter referred to as 'Effective Date') to the year 2028 (hereinafter referred to as 'the Contract Expiry Date').

D. SCOPE OF AGREEMENT

(a) The Government hereby appoints the Company and the Company accepts the appointment on the terms and conditions as provided under this Agreement. It being agreed and accepted that the Company shall be solely responsible for carrying out the forestry activities in particular in maintaining, managing, providing yearly forest management plan and a ten yearly plan in managing the forest reserve (hereinafter referred to as 'the forestry activities') at the Gading and Bukit Belata Forest Reserve (hereinafter referred to as the said 'forest reserve').

(b) The Company accepts the appointment on a condition that it will maintain and manage the said forestry activities at the said forest reserve provided that the minimum acreage of concession shall not be less than 300 hectares with a minimum yield of 45 m3 tonne per hectare.

(c) In consideration of the Government providing the above, the Company hereby agrees to provide the forestry activities together with the Pre-F and Post F inventories.

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(d) The Company agrees that the Company will maintain the said forest reserve at the areas designed for logyards in the forest reserve.

The Company also agrees to maintain the main logging road to the designated concession area PROVIDED the Company is allowed the concession.

F. OBLIGATIONS CF THE PARTIES

General duties

The Company shall: —

(a) perform the forestry activities in the forest reserve and its obligations stated hereinabove in accordance to Clause D hereinabove.

(b) perform the forestry activities in the forest reserve in a proper manner and in accordance with good management practice and to the best advantage of the Government and shall comply with the present laws and statute.

(c) perform the forestry activities and discharge its obligation as contained in this Agreement by exercising professional judgment and practice, requisite skill, care and diligence in carrying out the forestry activities, The Company shall provide well-outlined procedures in the form agreed by the Government for co-ordination and reporting purposes;

(d) inform the Government immediately in writing of the occurrence of any factor or event, which is likely to affect the forestry activities. Such notification shall be construed as a discharge of any of the Company's obligations under this Agreement.

In addition to the general duties, the duties and obligations of the Company are as follow: —

(a) Shall provide at its own cost and expense all equipment and materials necessary for the proper and effective performances of the forestry activities.

(b) shall ensure that proper records relating to the forestry activities are maintained at all times and that such records are at all reasonable times available for inspection by the Government's authorized officers or auditors,

(c) apply appropriate forest management which will increase the potential of the forest to produce marketable timber and other forest product.

(d) agrees to maintain the drainage/connecting roads/bridges to and in the said forest reserve.

M. TERMINATION ON NATIONAL INTEREST

(a) Notwithstanding any provision of this Agreement, the Government may terminate this Agreement by giving not less than sixty (60) days notice to that effect to the Company (without any obligation to give reason thereof) if it

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considers that such termination is necessary for national interest, in the interest of national security or for the purposes of Government policy or public policy.

(b) Upon such termination, the Company shall be entitled to compensation which shall be determined by an independent auditor appointed by the Government after due consultation with the Company.

For the purposes of this Clause, what constitutes 'national interest', 'interest of national security', 'the Government policy' and 'public policy' shall be solely made and determined by the Government and such determination shall for all intent and purposes be final and conclusive and shall no be open to challenge whatsoever.

[13] The first defendant did not respond to the plaintiff's letter of 7 July 2003 and there is to date no formal agreement executed between the plaintiff and the second defendant.

[14] Between 2000–2005, there were also other compartments, to wit: Hutan Simpan Gading Kompt 52A, B, C and F, 64, 52E and 49, 69, 50, 16 and 18 worked on by the plaintiff after licenses were issued by the first defendant.

[15] Whilst the plaintiff was still working on these various compartments, the first defendant by a letter dated 5 October 2005 wrote to the plaintiff to halt the plaintiff's logging activities in the Taman Warisan Negeri ('Taman Warisan') area of the state as directed pursuant to the decision of the Selangor State Government Council meeting (31/2005). This letter also merits full reproduction:

Rujukan Kami: Bil.(11)dlm.PHN.SEL. 05/21/1/2 J1d. 2

Tarikh: 1 Ramadhan 1426 5 Oktober2005

Pengarah Urusan, Sebati

Sdn. Bhd., Lot. 3005,

Jalan Ulu Yam

44300 Batang Kali,

Hulu Selangor.

Tuan,

Aktiviti Pembalakan Di Dalam Kawasan Taman Negeri

Dengan segala hormatnya perkara di atas adalah di rujuk.

2. Dimaklumkan bahawa keputusan Majlis Mesyuarat Kerajaan Negeri (MMKN Ke 24/2005) pada 21 September 2005 telah mengarahkan Jabatan Perhutanan Negeri Selangor segera menghentikan aktiviti pembalakan di dalam kawasan

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Taman Negeri setelah ianya diwartakan serta mengarahkan semua syarikat-syarikat yang menjalankan aktiviti tersebut untuk mencari kawasan lain sebagai ganti.

3. Sehubungan dengan itu pihak tuan adalah dikehendaki untuk menghentikan aktiviti yang berkaitan dengan pembalakan di kawasan berikut: —

Bil.	Kompartmen	Luas
1.	49 Hutan Simpan Gading	145 hektar
2.	69 Hutan Simpan Gading	110hektar
3.	50 Hutan Simpan Gading	162 hektar
4.	16 Hutan Simpan Gading	142 hektar
5.	18 Hutan Simpan Gading	205 hektar

Sekian untuk perhatian dan tindakan tuan.

Terima kasih.

'BERKHIDMAT UNTUK NEGARA'

Saya yang menurut perintah,

(NIK MOHD SHAH BIN NIK MUSTAFA)

Pengarah Perhutanan Negeri Selangor

Darul Ehsan).

• s.k. - Pegawai Hutan Daerah,

Pejabat Hutan Daerah,

Hulu Selangor,

48000 Rawang,

Selangor Darul Ehsan.

[16] By a further letter dated 27 December 2005, the first defendant as transitionary measure wrote to the plaintiff permitting the plaintiff to continue to log in the affected area for a further six months period pending the notification of the Taman Warisan in the State *Gazette*.

[17] The plaintiff was thereafter required to apply for alternative areas to the affected areas for continued logging. The plaintiff complied accordingly but the first defendant by a letter dated 20 February 2006 notified the plaintiff that the alternative areas applied for were unsuitable. The plaintiff was also advised to review the production plan for the agreed allocated areas based on sustainable management methods.

[18] The plaintiff did not apply for further alternative areas and the first defendant did not also issue any further logging license or permit to the plaintiff for those areas in the Taman Warisan.

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THE PLAINTIFF'S CONTENTIONS

[19] In gist, it is the plaintiff's case that there was a logging contract in existence between the parties based on the approval letter and the performance thereunder notwithstanding that no formal agreement was executed by the parties.

[20] This logging contract was however terminated by reason that the defendants prevented the plaintiff from further carrying out logging activities in the concession area. The defendants also failed and/or refused to issue new logging licenses and permits to the plaintiff. The plaintiff asserted that the aforesaid prevention and failure and/or refusal on the part of the defendants constituted a repudiatory breach of contract which was accepted by the plaintiff when this suit was filed. Accordingly the plaintiff is entitled to compensation as claimed.

THE DEFENDANTS' CONTENTIONS

[21] The defendants responded by asserting there was no breach because there was no logging contract in existence particularly due to the non-fulfillment of condition (a) of the approval letter, to wit: no formal agreement was executed by the parties. In addition, the defendants asserted that the plaintiff was in breach of conditions (d) and (f) of the approval letter for not preparing the forest management plan and the annual forest recovery and development plan and reports.

[22] Furthermore, the defendants contended that they were entitled to rely on condition (j) of the approval letter to justify their action. Alternatively the logging contract was frustrated. In any event, the first defendant is exempted from liability pursuant to s 106 of the National Forestry Act 1984 (Act 313) because all actions arose from the decisions of the Selangor State Government EXCO.

FINDINGS OF THE COURT

[23] There are essentially two issues for determination as this stage of the trial on liability, to wit: firstly whether there was binding contract between the parties and secondly if there was a binding contract, whether the contract was terminated and the consequences thereto.

[24] As to the first issue on the existence of a binding contract, the law on consequences of the non-signing or execution of an agreement is set-out in the Supreme Court case of *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754 where Edgar Joseph SCJ said: '... the

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existence of an agreement depends upon the intention of the parties, and that for there to be an agreement, the parties must be ad idem, ie there must be a consensus between them. But bearing in mind the familiar saying that a person's belief or his state of mind are just as much facts as the state of his digestion or the existence of a tangible object, from what factors may be existence of an agreement be inferred? *The authorities show that such inference must be drawn from the language the parties have used, their conduct, regard being had to the surrounding circumstances, and the object of the contract …* merely because the parties contemplate the preparation of a formal contract, that would not prevent a binding contract from coming into existence before the formal contract is signed. However, where an arrangement is made 'subject to contract' or 'subject to the preparation and approval of a formal contract', it will generally be construed to mean that the parties are still negotiating and do not intend to be bound until a formal contract is exchanged …'. (Emphasis added.)

[25] It is noted that the Supreme Court in that case did not find the existence of a binding contract principally because there were two vital qualifying provisions in the letter of acceptance, which read: '*subject to the following terms and conditions*' and '… that the terms and conditions in the form of an agreement between YC Chin Enterprises and AHTD and that appropriate indemnity clauses in favour of AHTD in respect of material defects in site work, foundation, and buildings in the project *be incorporated in the said agreement*.' (Emphasis added.) It is nevertheless seen that the parties therein were actively negotiating on the formal agreement between September 1984 and December 1986 but no agreement and approval on the formal agreement were obtained. The defendant therein became exasperated and on 27 August 1987 wrote to the plaintiff to cease all work besides reminding the plaintiff that the works were subject to a formal contract to be drawn up but that the plaintiff was unwilling to discuss and agree to mutually acceptable terms.

[26] Although there is a similar provision herein by virtue of condition (a) of the approval letter, I however find and hold that the parties herein by their conduct were ad idem on the terms including those as proposed in the draft formal agreement. This document was based on provisions as proposed by the first defendant on 10 May 2003 and re-submitted by the plaintiff to the defendants on 7 July 2003 for adoption and execution. The defendants did not respond whatsoever and the defendants continued to recognise the logging contract by permitting the plaintiff to work normally as per the approval letter. The conduct of the parties here, particularly the defendants in treating the logging contract as subsisting notwithstanding the non-execution of a formal agreement and benefiting from the forest produce cess collection is akin to the conduct seen of the parties in the case of *Bukit Kiara Resort Bhd v Dato Bandar*

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Kuala Lumpur [2012] 2 MLJ 783. In that case, the High Court upheld the oral agreement to lease notwithstanding that the formal written lease agreement was not executed.

[27] I am also mindful that condition (a) in the approval letter required the formal agreement to be executed within the six months from 30 September 1999. There is however no clear stipulation as to who is responsible for drawing up the agreement but it is plain that this condition can only be met with co-operation from both parties. The plaintiff had in fact within the six months period nevertheless undertaken that task by submitting the initial draft formal agreement to the defendants on 16 November 1999. Since there was no response whatsoever from the defendants, I find and hold that the requirement for execution within that period is waived, otherwise the defendants are estopped from objecting to it since the defendants had themselves prevented the fulfillment of that requirement. The defendants cannot take advantage of their own wrong following *Poon Guan Sdn Bhd v Sem Siong Industries Sdn Bhd* [1983] 2 MLJ 317. Be that as it may, the six months time stipulation also ceased to be of essence because the defendants permitted the logging activities to continue to be undertaken following the principle established by the Federal Court in *Sim Chio Huat v Wong Ted Fui* [1983] 1 MLJ 151.

[28] Accordingly, I find and hold that there is a valid and binding logging contract between the parties in the circumstances. The terms of the logging contract comprise those in the approval letter as well as the draft formal agreement following the Court of Appeal case of *Nippon Express (M) Sdn Bhd v Che Kiang Realty Sdn Bhd & Anor* [2013] 7 CLJ 713 since the latter was not contested by the defendants in any way. In other words, the defendants had acquiesced to those terms.

[29] As to the defendants' contentions of breach of conditions (d) and (f) of the approval letter, the burden of proof plainly lies on the defendants. Following s 101 of the Evidence Act 1950 and the cases of *Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd* [1998] 1 MLJ 697 and *Pengurusan Danaharta Nasional Bhd v Dato' Sng Chee Hua & Anor* [2006] 6 MLJ 477; [2006] 8 CLJ 345, I find that the defendants have not sufficiently discharged their burden of proof that the plaintiffs failed to submit the requisite plans and reports. There was no contemporaneous written complaint whatsoever by the first defendant which would reasonably be expected if indeed there was such failure. Moreover PW2, the forest ranger responsible for overseeing the operations of the plaintiff's works testified that the plaintiff complied with the required procedures. It is an undisputed fact that logging activities occurred for seven years and that must necessarily have been pursuant to a certain plan of action known and acceptable to the first defendant.

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[30] Be that as it may, even if there were such breaches as alleged, that does not aid the defendant because it is not the defendants' pleaded case that the logging contract was terminated for the breach of those conditions nor was there a counterclaim for damages pleaded for these alleged breaches.

[31] Now in respect of the second issue on termination of the contract and consequences thereto, it is contended by the plaintiff that by the first defendant's letter dated 5 October 2005 issued to the plaintiff and subsequent action denying the plaintiff further licenses to carry out logging activities in the Taman Warisan area constituted a repudiatory breach of contract on the part of the second defendant. In s 40 of the Contracts Act 1950 it is provided that: 'When a party to a contract has refused to perform, or disabled himself from performing the contract in its entirety, the promise may put an end to the contract, unless he has signified by words or conduct , his acquiescence in its acceptance.' The repudiation was allegedly accepted by the plaintiff by the filing of this suit, thus discharging or terminating the logging contract following the Court of Appeal cases of *LSSC Development Sdn Bhd v Thomas a/l Iruthayam & Anor* [2007] 4 MLJ 1 and *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2013] 6 MLJ 836; [2013] 7 CLJ 969.

[32] The defendants have however argued that the letter of 5 October 2005 should be construed as a temporary suspension of the performance of the logging contract for certain parts of the concession area in the Taman Warisan. The other areas such as those outside the Taman Warisan in Bukit Gading and that in Bukit Belata were not affected. This is testified and explained by DW3 in the following words: 'Kalau mengikut keputusan iaitu dokumen (D6) tu Kerajaan Negeri telah meminta Jabatan Hutan mengambil tindakan ... apa-apa tindakan di dalam kawasan Taman Negeri ... Jadi pada masa tu ... aktiviti pembalakan oleh syarikat tu ada beberapa tu adalah yang sedang menjalankan aktiviti pembalakan ... mengikut keputusan negeri ni ... *is not the termination of the agreement* lagipun tak ada agreement pun ... Cuma memberhentikan pembalakan di dalam kawasan taman negeri ... *kalau ada aktiviti pembalakan di luar daripada Taman Negeri oleh Syarikat Sebati umpamanya di Bukit Belata tak ada kena mengena dengan keputusan ini ...*'. (Emphasis added.)

[33] Contrary to the plaintiff's contentions, I find and hold there was no repudiatory breach of contract on the part of the defendants. The letter of 5 October 2005 is upon its true construction an exercise of the power conferred by the condition (j) of the approval letter. The clause is in substance an 'omission' contractual provision and that power must be exercised in good faith, otherwise it would be a breach of contract following the Federal Court case of *Pembinaan Perwira Harta Sdn Bhd v Letrikon Jaya Bina Sdn Bhd* [2013] 2 MLJ 620; [2013] 2 AMR 210. An example of bad faith is the exercise of power to omit and permit another third party to log instead. It is undisputed

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that the conception of the Taman Warisan was made in the public interest as a National Park. The power was therefore in my view exercised reasonably for a lawful purpose.

[34] The letter of 5 October 2005 further requested the plaintiff to seek and propose alternative logging areas in replacement of those areas affected by the Taman Warisan. I find that it was a kind gesture of the defendants as there was no legal obligation on the part of the defendants to provide alternative logging areas if condition (j) of the approval letter was exercised. In addition, the defendants could also not be faulted for not providing alternative logging areas to the plaintiff because the plaintiff did not make further applications after the one made by the plaintiff was rejected by the first defendant on 20 February 2006. Thus, the defendants could not be said to have refused or prevented the issuance of further logging licenses or permits to the plaintiff.

[35] The logging contract is for both the Bukit Gading and Bukit Belata Forests logging and not severable. It must be noted that s 40 of the Contracts Act 1950 requires the refusal or disability to honour the contract by the party at fault to be in entirety before the other party can rescind the contract. That does not appear to be the case here.

[36] Since logging activities were still permissible and ongoing in the Bukit Belata area and cancellation of the existing logging activities in the Bukit Gading area was lawful pursuant to the exercise of a contractual power, the defendants could not in the circumstances be in repudiation that was capable of acceptance by the plaintiff. If the plaintiff had indeed treated the logging contract as terminated, then it is the plaintiff who wrongly repudiated the contract; see *Industrial & Agricultural Distribution Sdn Bhd v Golden Sands Construction Sdn Bhd* [1993] 3 MLJ 433. It is therefore unnecessary for me to consider frustration of the contract as alternatively argued by the defendants since frustration is neither pleaded nor even applicable on the facts as found.

[37] As to the consequences of the exercise of the power conferred by condition (j) of the approval letter, I find and hold that it does not attract cl M on termination on national interest in the draft formal agreement because the logging contract was not in substance terminated in entirety. Furthermore there was at all material times no act of termination of the logging contract by the second defendant or the first defendant on its behalf. In other words, the logging contract subsisted as far as the defendants are concerned. Since, I have also found and held that the plaintiff was not in the position to justify that the contract was terminated as well for repudiatory breach, there is accordingly no compensation or damages payable by the defendants either through cl M or at common law.

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[38] I note that condition (j) of the approval letter is silent on the financial consequence if that provision is exercised. As a matter of general principle, I hold that since it is a right accorded by the contract, it cannot attract compensation unless it is expressly so provided or if the condition was exercised in bad faith. Based on the circumstances herein where condition (j) had been exercised in the national interest, I hence find and hold that there is no compensation payable by the defendants to the plaintiff. Accordingly it is also unnecessary for me to determine whether the first defendant is protected by the immunity provision in s 106 of the National Forestry Act 1984.

CONCLUSION

[39] I sympathise with the plaintiff here for having expended time and monetary investment in this logging venture but which has now been reduced in scope. This is however the commercial risk assumed by the plaintiff in such contract with the inclusion of an express power to omit. The risk unfortunately eventuated herein and the plaintiff lost the opportunity to make a sizeable profit.

[40] Thus and notwithstanding that I have found a binding contract between the parties, there was however no repudiation of the contract by the defendant to justify the plaintiff's claim for compensation. Accordingly I hereby order that the plaintiff's claim as pleaded be dismissed with costs. There is also no necessity to proceed further with the next stage of the trial on assessment of damages.

Claim dismissed with costs.

Reported by Afiq Mohamad Noor